

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEONDO SHAMAAR TAYLOR,

Defendant-Appellant.

UNPUBLISHED

June 28, 2011

No. 296915

Jackson Circuit Court

LC No. 08-004311-FH

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Before trial started, defendant pleaded guilty to failure to register as a sex offender, MCL 28.723. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 15 to 22½ years on the criminal sexual conduct conviction and 3 to 6 years on the failing to register conviction. Defendant appeals as of right. We affirm defendant's conviction for criminal sexual conduct, but vacate his sentence and remand for resentencing.

On appeal, defendant argues that he is entitled to a new trial because the trial court closed the courtroom to all unnecessary persons during a portion of the victim's testimony. According to defendant, the closure of the courtroom violated MCL 600.2163a and his constitutional right to a public trial.

A defendant has a sixth amendment right to a public trial. *Presley v Georgia*, 558 US ___, 130 S Ct 721, 723; 175 L Ed 2d 675 (2010). "However, this right is not self-executing: the defendant must timely assert the right. . . . [T]he failure to timely assert the right to a public trial forecloses the later grant of relief." *People v Vaughn*, ___ Mich App ___, ___ NW2d ___ (2010). In *Vaughn*, this Court held that where defense counsel did not object to the trial court's decision to close the courtroom during jury selection, the trial court's error did not warrant relief for the defendant.

In this case, defense counsel initially objected to the prosecutor's request that the courtroom be closed for the remainder of the victim's testimony. But he ultimately left the matter up to the court's discretion, stating that he would "leave this in the discretion of the

court.” A defendant may not acquiesce in a ruling by the trial court and then raise the ruling as an issue on appeal. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Accordingly, defendant waived any issue regarding the trial court’s decision to close the courtroom for a portion of the victim’s testimony.

Defendant next argues that he is entitled to be resentenced because the trial court erred in scoring ten points for offense variable (OV) 3. We agree.

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in support. *Id.*

Ten points may be scored for OV 3 if “[b]odily injury requiring medical treatment occurred to a victim.” MCL 777.33(1)(d). In scoring 10 points for OV 3, the trial court relied on the statement from the presentence investigation report that the victim “was having trouble breathing and kept losing consciousness.” However, nothing in the record indicates that the victim’s breathing troubles and inability to maintain consciousness were related to a physical injury to her body sustained in the sexual assault, rather than to the psychological damage of being sexually assaulted and then having to give the details of the assault. The emergency room physician testified that she observed no physical injury to the victim. We note that ten points were scored for OV 4, MCL 777.34, for the psychological injury suffered by the victim. Given that ten points were scored for OV 4 and the lack of evidence showing a physical injury to the victim, we conclude that the trial court abused its discretion in finding that the victim suffered a bodily injury and scoring ten points for OV 3. Because the error in scoring OV 3 alters the appropriate guidelines range, defendant is entitled to be resentenced. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006). We therefore vacate defendant’s sentence for the criminal sexual conduct conviction and remand for resentencing.¹

Affirmed in part, vacated in part, and remanded for resentencing. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

¹ Because we conclude that defendant is entitled to be resentenced, we need not address his claim that counsel was ineffective for failing to object to the scoring of OV 3 at the initial sentencing hearing.